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TRESPASS AND VANDALISM OR PROTECTING THAT WHICH IS HOLY? THE MISSING PIECE OF RELIGIOUS LIBERTY LAND-USE CLAIMS

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INTRODUCTION

On October 27, 2016, Casey Camp-Horinek was arrested for praying.[1] The State of North Dakota claims that she was arrested for trespass, rioting, and endangerment by fire, but Camp-Horinek was acting out of a religious duty to protect the purity of Lake Oahe.[2] This Comment will discuss whether the enforcement of these laws against Camp-Horinek imposes a substantial burden on her right to practice her religion in violation of the Religious Freedom Restoration Act (RFRA).[3]

American courts struggle to understand Native[4] religions.[5] This struggle has been particularly apparent in decisions on religious liberty

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1. See Jenni Monet, For Native 'Water Protectors,' Standing Rock Protest Has Become Fight for Religious Freedom, Human Rights, PBS (Nov. 3, 2016), https://www.pbs.org/newshour/nation/military-force-criticized-dakota-access-pipeline-protests [https://perma.cc/J5JS-SPNM].

2. Id.

3. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

4. A note on terminology: Indigenous people, who predate the concept of "America," self-identify in numerous ways. See Amanda Blackhorse, Blackhorse: Do You Prefer 'Native American' or 'American Indian'?, Indian Country Today (May 22, 2015), https://newsmaven.io/indiancountrytoday/archive/blackhorse-do-you-prefer-native-american-or-american-indian-kHWRPJqIGU6X3FTVdMi9EQ/ [https://perma.cc/96SV-3J5Y]. When speaking generally and not about a specific tribe, I have chosen to use the word "Native." However, I have generally left references to Native American, Indian, American Indian, etc., unchanged in quoted text.

5. See Vine Deloria, Jr., For This Land: Writings on Religion in America 205 (James Treat ed., 1999) [hereinafter Deloria, For This Land] (describing as "troubling" the Supreme Court's "insistence on analyzing tribal religions within the same conceptual framework as Western organized religions"); David H. Getches et al., Cases and Materials on Federal Indian Law 769 (7th ed. 2017) ("[T]he separate treatment of 'religion' and 'culture' and 'property' reflects the inadequacies of the dominant society's categories in trying to accommodate Indian spiritual beliefs and value systems."). While this Comment addresses certain tenets of Native religions in Parts I and III, it is important to acknowledge that the discussion is based on a limited understanding of Native religious practices. It also, at times, compares Native religions to other religions, see, e.g., infra note 39, with

land-use claims, where the Supreme Court has held that government action that "virtually destroy[s] [Natives'] religion" and will "force them into abandoning [their] practices altogether"[6] does not constitute a substantial burden on said religion.

In *Burwell v. Hobby Lobby Stores, Inc.*,[7] the Supreme Court took a more solicitous view of religious liberty claims. In *Hobby Lobby*, the Court decided that RFRA was intended as a break from previous free exercise jurisprudence and mandated careful scrutiny of all government action that burdened an individual's practice of her religion.[8]

This holding breathes new life into religious liberty land-use claims. Previously, tribes have struggled to demonstrate that government decisions concerning the use of federal land imposed a substantial burden on their religious practices because they could not show that practicing their religion triggered either (1) criminal or civil sanctions or (2) the withholding of a government benefit.[9] But tribes may have more success under *Hobby Lobby*'s new substantial burden test.

This Comment introduces a possible theory of litigation for Native land-use cases under RFRA. Relying on *Hobby Lobby*'s framework, this Comment argues that tribes may show that government regulation of federally owned land imparts a substantial burden to the practice of their religion by pointing to an affirmative religious obligation to protect sacred places or to be a steward of the land.[10] Tribes may meet the substantial burden prong of the analysis by showing that they are forced to choose between either abandoning their religious duty to protect holy land or facing sanctions for meeting their duty to protect holy places through acts of civil disobedience. In this way, *Hobby Lobby*'s substantial burden analysis provides an opportunity for practitioners of Native religions to overcome the substantial burden obstacle that has consistently doomed religious liberty land-use claims.

This Comment proceeds in three parts. Part I discusses pre-*Hobby Lobby* religious liberty doctrine under the First Amendment and RFRA and reviews cases applying this doctrine to religious liberty land-use cases. Part II reviews how *Hobby Lobby* changed the RFRA analysis. Finally,

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equally limited understanding of those religions. Every effort has been made to refrain from making any misstatements about any person's religious beliefs and also from overgeneralizing and implying the existence of one unifying "Native religion." The purpose of this Comment is to explore a potential legal strategy for protecting holy land; it necessarily relies on Native religious beliefs without having the space to properly expound on those beliefs.

6. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 467 (1988) (Brennan, J., dissenting).

7. 134 S. Ct. 2751 (2014).

8. See id. at 2772–74.

9. See infra section I.B.

10. Because RFRA protects against only government action, tribes would not be able to challenge actions of private land owners. See infra section I.A.

Part III demonstrates how tribes can use a religious duty to protect sacred places to meet RFRA's substantial burden requirement as explained in *Hobby Lobby*.

I. FREE EXERCISE AND RELIGIOUS LIBERTY LAND-USE CLAIMS PRIOR TO *HOBBY LOBBY*

This Part reviews the foundation of RFRA and the substantial burden–compelling interest test (section I.A) and how it has been applied to religious liberty land-use claims (section I.B).

A. Sherbert, Yoder, Smith, *and RFRA's Genesis*

The substantial burden–compelling interest test for free exercise claims originated in two Supreme Court decisions. In *Sherbert v. Verner*, the Court considered a religious liberty challenge to the denial of unemployment benefits to a Seventh-day Adventist who was fired because she refused to work on Saturdays.[11] The Court held that the state could prevail only if "any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'"[12] The Court affirmed the test in *Wisconsin v. Yoder*, which involved a free exercise challenge to a state law compelling school attendance for children under sixteen.[13] Crediting expert testimony that mandatory high school education would "ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today,"[14] the Court held that the state's mandatory high school education law violated the Free Exercise Clause.[15]

Employment Division v. Smith,[16] which concerned the sacramental use of peyote by members of the Native American Church, changed the free exercise analysis. The Court held that the government burdened a party's free exercise right when it passed a law that prohibited religious "acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display."[17] *Smith* declared that

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11. 374 U.S. 398, 399–400 (1963).

12. Id. at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

13. 406 U.S. 205, 207 (1972).

14. Id. at 212. It is worth restating that the Court was not swayed by the threatened destruction of Native religion in *Lyng*. See Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451–52 (1988) ("Even if we assume . . . the G–O road will 'virtually destroy the . . . Indians' ability to practice their religion,' the Constitution simply does not provide a principle that could justify upholding respondents' legal claims." (citation omitted) (quoting Nw. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 693 (9th Cir. 1986))).

15. *Yoder*, 406 U.S. at 234.

16. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

17. Id. at 877.

applying the test from *Sherbert* and *Yoder* would "court[] anarchy," and instead held that the Free Exercise Clause did not prohibit "generally applicable" laws, like a law proscribing peyote consumption, that are "not specifically directed . . . [toward] religious practice."[18]

Congress enacted RFRA in 1993, three years after *Smith*, "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened."[19] The statute declared that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise," and that the government should have a "compelling justification" for burdening religion.[20]

In 2006, the Court in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* noted that RFRA "adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*."[21] In *Gonzales*, the Court considered whether, under RFRA, the federal government could apply the Controlled Substances Act (CSA) to the sacramental use of a hallucinogenic tea by a Christian Spiritist sect.[22] Because the government conceded that the CSA's criminal sanctions constituted a substantial burden on the petitioners' religion, the Court focused on the compelling interest prong of the inquiry.[23] Relying on *Sherbert* and *Yoder* to inform its analysis,[24] the Court ruled that the government had not demonstrated that applying the CSA to the petitioners was "the least restrictive means of furthering [the] compelling governmental interest."[25]

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18. Id. at 878, 888. *Smith* distinguished *Sherbert* as applicable only in cases challenging the denial of unemployment compensation when the denial was based on conduct not otherwise prohibited by law, see id. at 883, and *Yoder* as a "hybrid" case that considered the Free Exercise Clause in conjunction with "the right of parents . . . to direct the education of their children," id. at 881.

19. Religious Freedom Restoration Act, Pub. L. No. 103-141, § 2, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb (2012)) (citations omitted).

20. 42 U.S.C. § 2000bb(a).

21. 546 U.S. 418, 424 (2006). The Court decided *Gonzales* six years after Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). *Gonzales* did not so much as mention RLUIPA, which is noteworthy given Justice Alito's statement in *Hobby Lobby* that RLUIPA evidenced a congressional intent to "effect a complete separation [of RFRA] from First Amendment case law." Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2762 (2014).

22. See *Gonzales*, 546 U.S. at 423.

23. See id. at 426.

24. Id. at 430–32.

25. Id. at 424 (quoting § 2000bb-1(b)). Even while recognizing RFRA as a rejection of *Smith*, *Gonzales* foreshadowed *Hobby Lobby*'s emphasis on an individualized compelling interest test. See id. at 430–31 ("[T]he Government [must] demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened.").

Like the Court in *Gonzales*,[26] lower federal courts often relied on *Sherbert* and *Yoder* to inform application of RFRA's substantial burden–compelling interest test.[27] This Comment focuses on the substantial burden prong of that test, the consensus understanding of which was succinctly explained by the Ninth Circuit in *Navajo Nation v. United States Forest Service*:

> Under RFRA, a "substantial burden" is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*). Any burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a "substantial burden" within the meaning of RFRA, and does not require the application of the compelling interest test set forth in those two cases.[28]

This quotation captures the obstacle that has repeatedly derailed Native religious liberty land-use claims: When Native religious practitioners are unable to demonstrate that they were forced by the government to act against their religious beliefs, courts dismiss their claims without considering whether the government has a compelling justification for its actions. The following section reviews three cases in which a court followed that exact script.

B. *Religious Liberty Land-Use Claims and the Old Substantial Burden Test*

Native religions are numerous and diverse, but many share a focus on sacred places.[29] In his book *For This Land: Writings on Religion in*

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26. See id. at 431 (citing *Sherbert* and *Yoder* to frame the compelling interest test under RFRA).

27. See, e.g., Kaemmerling v. Lappin, 553 F.3d 669, 677 (D.C. Cir. 2008); see also Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1069–70 (9th Cir. 2008) (en banc); Henderson v. Kennedy, 253 F.3d 12, 15 (D.C. Cir. 2001); Adams v. Comm'r, 170 F.3d 173, 176 (3d Cir. 1999); S. Fork Band v. U.S. Dep't of Interior, 643 F. Supp. 2d 1192, 1199 (D. Nev. 2009); Branch Ministries v. Rossotti, 40 F. Supp. 2d 15, 24 n.7 (D.D.C. 1999).

28. *Navajo Nation*, 535 F.3d at 1069–70.

29. For an overview describing the importance that "place" plays in several tribal belief systems, see generally Peter Nabokov, Where the Lightning Strikes: The Lives of American Indian Sacred Places (2006). For additional information, see Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 460–61 (1988) (Brennan, J., dissenting) ("Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land. The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being."); Michael D. McNally, From Substantial Burden on Religion to Diminished Spiritual Fulfillment: The San Francisco Peaks Case and the Misunderstanding of Native American Religion, 30 J.L. & Rel. 36, 50 (2015) ("Traditional Native American religions are profoundly local, tied to particular places not simply through deep feeling and aesthetic appreciation . . . but also through a whole range of narratives, ritual disciplines, and sophisticated moral codes related to particular places."); Rosalyn R. LaPier, Here's What No One Understands About the Dakota Access Pipeline Crisis, Wash. Post (Nov. 4, 2016), https://www.washingtonpost.com/posteverything/wp/2016/11/04/heres-what-no-one-understands-about-the-dakota-access-

America, Professor Vine Deloria, Jr., describes four categories[30] of sacred land: (1) places that are revered because they commemorate an important human action or event, like Wounded Knee, South Dakota;[31] (2) places that mark where "the sacred appeared in the lives of human beings," like the Buffalo Gap in the Black Hills of South Dakota that "marks the location where the Buffalo emerged each spring to begin the ceremonial year of the Plains Indians";[32] (3) places of "inherent sacredness" and "overwhelming Holiness, where Higher Powers, on their own initiative, have revealed themselves to human beings," examples of which include Bear Butte and Blue Lake;[33] and (4) sacred places that have not yet been revealed to human beings.[34]

The cases discussed in the next section describe litigation concerning sacred places that fall into the second or third of Professor Deloria's categories. "[C]eremonies derived from or related to these Holy Places" have "planetary importance."[35] Members are compelled to "perform certain . . . ceremonies at certain times and places in order that the sun may continue to shine, the earth prosper, and the stars remain in the heavens."[36] As one scholar has noted, "The religious leaders who perform these rituals and ceremonies tend to see themselves as caretakers of Mother Earth."[37] Frequently, the people entrusted to perform these ceremonies must do so "under various forms of subterfuge and have been abused and imprisoned for doing them."[38]

The existence of holy places in Native religions is not unique; many (or most) religions have places considered sacred or holy.[39] Native sacred

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pipeline-crisis/ (on file with the *Columbia Law Review*) (describing all sacred places within Blackfeet tribal territory as falling into one of two categories: "those set aside for the divine, such as a dwelling place, and those set aside for human remembrance, such as a burial or battle site").

30. Professor Deloria cautions that these categories emerge when the topic is subjected to a "Western rational analysis" and are useful for discussion but "do[] not represent the nature of reality." Deloria, For This Land, supra note 5, at 207.

31. Id.

32. Id. at 208.

33. Id. at 209–10.

34. Id. at 211.

35. Id. at 210.

36. Id.

37. Dean B. Suagee, American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers, 10 Am. Indian L. Rev. 1, 10 (1982).

38. Deloria, For This Land, supra note 5, at 210.

39. Examples include the Kaaba for followers of Islam and the Wailing Wall for Jewish, Muslim, and Christian adherents alike. See generally Sven Müller, Spaces of Rites and Locations of Risk: The Great Pilgrimage to Mecca, *in* The Changing World Religion Map 841, 844 (Stanley D. Brunn ed., 2015) ("[T]he importance of Mecca immediately stems from the location of the Kaaba . . . [which] relates to the arrival of Adam on earth after the fall of humankind."); Simone Ricca, Heritage, Nationalism and the Shifting Symbolism of the Wailing Wall, 151 Archives de Sciences Sociales des Religions 169, 170, 173 (2010) (describing beliefs attaching religious significance to the Wailing Wall in Judaism

places are unique, however, in the way they have been treated by the United States government. It seems safe to assume that no government would consider defiling the Temple Mount by allowing it to be sprayed with recycled human wastewater,[40] or destroying it to make way for an oil pipeline.[41] The paramount importance of sacred places to Native religions, along with the federal government's willingness to disregard this importance, has given rise to a series of lawsuits brought by tribes against the government seeking to protect the sanctity of holy places. To understand how *Hobby Lobby* creates an opportunity for such cases in the future, it is important to first understand why this type of claim has been unsuccessful in the past. The following sections briefly recount three religious liberty land-use cases, focusing on the courts' reasoning for ruling against tribes. Section I.B.1 describes *Lyng v. Northwest Indian Cemetery Protective Ass'n*, section I.B.2 focuses on *Navajo Nation v. United States Forest Service*, and section I.B.3 discusses the religious liberty aspects of the ongoing dispute around the North Dakota Access Pipeline.

1. Lyng*: Decreased Spiritual Fulfillment. — Lyng v. Northwest Indian Cemetery Protective Ass'n*—a pre-RFRA case in which the Supreme Court of the United States equated the virtual destruction of a religion with decreased "spiritual fulfillment"[42]—sets the standard for religious liberty land-use claims. In *Lyng*, members of the Yurok, Karok, and Tolowa tribes sought to prevent the construction of a road through the high country, "the most sacred of lands," which comprises approximately twenty-five square miles in the Six Rivers National Forest.[43] The Forest Service decided to build the road, even though its own study recommended against construction because the road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples."[44]

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as a place connected to the "Presence of God" and in Islam as "the tethering place of al-Buraq, the Prophet's magical steed").

40. See infra section I.B.2, describing how the United States Forest Service allowed a private ski resort to spray artificial snow made from recycled human wastewater on a mountain considered by several tribes to be one of the holiest places in the world.

41. See infra section I.B.3; cf. Sarah Pulliam Bailey, The Dakota Access Pipeline Isn't Just About the Environment. It's About Religion., Wash. Post (Dec. 5, 2016), https://www.washingtonpost.com/news/acts-of-faith/wp/2016/12/05/the-dakota-access-pipeline-isnt-just-about-the-environment-its-about-religion/ (on file with the *Columbia Law Review*) (imagining what would happen if "the pipeline was being built in Bethlehem, underneath Jerusalem or a similar holy site").

42. 485 U.S. 439, 452 (1988); see also id. at 459, 461 (Brennan, J., dissenting) (describing the government's actions as "threaten[ing] the very existence of a Native American religion").

43. Id. at 459 (Brennan, J., dissenting).

44. Id. at 442 (majority opinion).

Despite uncontested evidence of how the proposed projects would "have devastating effects on traditional Indian religious practices,"[45] the majority concluded that building the road did not violate the Free Exercise Clause because the tribes would not "be coerced by the Government's action into violating their religious beliefs; nor would [the] governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[46] Holding that the federal government may destroy one's ability to practice her religion without coercing her to violate her religious beliefs, the majority opinion turned almost entirely on the fact that individual practitioners did not show that they were forced to act against their beliefs by the threat of civil or criminal sanctions.[47]

2. Navajo Nation*: Subjective Emotional Religious Experience.* — According to the Navajo, Dook'o'oosliid, known commonly as the San Francisco Peaks ("the Peaks"), is "the holiest of shrines in [the Navajo] way of life."[48] The Navajo understand the mountain to be the place of the Navajo's creation and "a source of power for living and healing."[49] One "cannot just voluntarily go upon [the] mountain at any time. . . . [One] [has] to sacrifice. [One] [has] to sing certain songs before you even dwell for a little bit to gather herbs, to do offerings."[50]

The Peaks, which sit in the Coconino National Forest in northern Arizona, are also home to the Snowbowl—a privately owned 777-acre recreational ski facility that operates under a special-use permit from the Park Service.[51] In 2002, the Snowbowl submitted a plan to the Forest Service for making snow from recycled human wastewater piped onto the mountain.[52] Over the objection of the Navajo, the Hopi, and several other tribes, the Forest Service approved the proposal in 2005.[53] The tribes challenged the Forest Service's decision under RFRA, arguing that using wastewater to make snow in the Snowbowl would contaminate the purity of the Peaks.[54] The Ninth Circuit, sitting en banc, held that the

45. Id. at 451.

46. Id. at 449.

47. The *Lyng* Court's statement that "[h]owever much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires," id. at 452, reads similarly to Justice Ginsburg's argument in her *Hobby Lobby* dissent, which was roundly rejected by the majority in that case. See infra section II.B.

48. McNally, supra note 29, at 40 (quoting Joe Shirley, Jr., former president of the Navajo Nation).

49. Id. at 39.

50. Id. at 40 (internal quotation marks omitted) (quoting Joe Shirley, Jr.).

51. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1064, 1082 (9th Cir. 2008) (en banc).

52. Id. at 1065.

53. Id. at 1066.

54. Id.

tribes had not demonstrated that the proposal was a substantial burden on their religious beliefs.[55]

The court held that RFRA incorporated the substantial burden–compelling interest test of *Sherbert* and *Yoder*, but that a court may only consider the compelling interest prong once the substantial burden prong was satisfied.[56] The court then held that the tribes failed to demonstrate that the application of wastewater on the holy mountain was a substantial burden on their religious beliefs:

> The use of recycled wastewater on a ski area that covers one percent of the Peaks does not force the Plaintiffs to choose between following the tenets of their religion and receiving a governmental benefit, as in *Sherbert*. The use of recycled wastewater to make artificial snow also does not coerce the Plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions, as in *Yoder*. The Plaintiffs are not fined or penalized in any way for practicing their religion on the Peaks or on the Snowbowl.[57]

The court then escalated *Lyng*'s rhetoric, declaring that the only harm done was to "Plaintiffs' subjective, emotional religious experience," and described the use of wastewater as "offensive to the Plaintiffs' religious sensibilities."[58] "[T]he diminishment of spiritual fulfillment," the court concluded, "is not a 'substantial burden' on the free exercise of religion."[59]

3. Standing Rock*: No Sanction, No Problem.* — The North Dakota Access Pipeline, which passes less than a half mile from the Standing Rock Sioux reservation and under Lake Oahe, a "federally regulated waterway,"[60] has been the subject of ongoing litigation and protest.[61] The religious liberty land-use claim is only one of several arguments made against the pipeline.[62] In their RFRA claim, the Cheyenne River Sioux noted that many of their ceremonies required "pure" water and argued that the pipeline would contaminate the water in nearby Lake Oahe,

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55. The tribes lost in the district court, Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866 (D. Ariz. 2006), but that decision was reversed by a Ninth Circuit panel, Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1029 (9th Cir. 2007). That panel's decision was reversed by the Ninth Circuit sitting en banc in the opinion described here.

56. *Navajo Nation*, 535 F.3d at 1069–70.

57. Id. at 1070.

58. Id.

59. Id.

60. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 239 F. Supp. 3d 77, 80 (D.D.C. 2017).

61. See generally Kevin Sullivan et al., Voices from Standing Rock, Wash. Post (Dec. 2, 2016), http://www.washingtonpost.com/sf/national/2016/12/02/voices-from-standing-rock/ (on file with the *Columbia Law Review*) (providing a sample of protester perspectives).

62. See *Standing Rock Sioux Tribe*, 239 F. Supp. 3d at 81 (providing background of various legal arguments concerning the pipeline).

making it unsuitable for religious use.[63] This was especially problematic because "Lake Oahe is the only source of natural, pure, uncontaminated water available to the people of the Cheyenne River Sioux Reservation."[64] Additionally, Steve Vance, Cheyenne River's Tribal Historic Preservation Officer, explained to the court in a declaration that the Missouri River, which includes Lake Oahe, is "important to our spirituality. It is an important source of our foods, medicines, water for drinking, and for living. It is the bloodline and the lifeline of the people at this time, and we cannot live without it."[65]

The court rejected the RFRA claim. Its reasoning echoed that of the *Navajo Nation*[66] decision: "The government action here . . . does not impose a sanction on the Tribe's members for exercising their religious beliefs, nor does it pressure them to choose between religious exercise and the receipt of government benefits."[67]

Courts rejected the religious liberty claims in *Lyng*, *Navajo Nation*, and *Standing Rock* for the same reason: Native religious practitioners did not face a substantial burden on their right to practice their religion because they were unable to show that they were forced to violate their religious beliefs by the threat of government sanctions or the withholding of a government benefit. Part II reveals how *Hobby Lobby* creates a new opportunity for practitioners to show such a burden in future religious liberty land-use cases.

II. HOW *HOBBY LOBBY* CHANGED THE RFRA SUBSTANTIAL BURDEN–COMPELLING INTEREST TEST

Burwell v. Hobby Lobby Stores, Inc. considered whether, under RFRA, the government could require closely held corporations to provide health insurance that covered certain types of contraceptives that the corporations' owners found objectionable for religious reasons.[68] For the purposes of this Comment, *Hobby Lobby* changed the RFRA analysis in two important ways. Section II.A reviews the majority's assertion that RFRA was intended to make a clean break from prior free exercise jurisprudence. Then, section II.B explains how the Court rejected the argument that attenuated harm does not amount to a substantial burden on the practice of religion because that argument impermissibly questioned the sincerity of one's religious belief. Finally, section II.C notes that *Hobby Lobby* emphasized but didn't meaningfully alter RFRA's compelling interest–least restrictive means test.

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63. Id. at 89.

64. Id.

65. Id.

66. In fact, the court relied on *Navajo Nation* as precedent, along with *Lyng*, *Sherbert*, and *Yoder*. See id. at 94.

67. Id. at 91.

68. 134 S. Ct. 2751, 2759 (2014).

A. *RFRA as a Break from Free Exercise Jurisprudence*

The *Hobby Lobby* majority rejected the consensus opinion that RFRA was enacted as a repudiation of *Smith*.[69] While *Gonzales* interpreted RFRA to "adopt[] a statutory rule comparable to the constitutional rule rejected in *Smith*,"[70] *Hobby Lobby* instead discerned "an obvious effort to effect a complete separation from First Amendment case law."[71] Unswayed by explicit references to *Sherbert* and *Yoder*, *Hobby Lobby* declared "nothing in the text of RFRA as originally enacted suggested that the statutory phrase 'exercise of religion under the First Amendment' was meant to be tied to this Court's pre-*Smith* interpretation of that Amendment."[72] With this analysis, *Hobby Lobby* divorced the pre-*Smith* free exercise jurisprudence from the substantial burden–compelling interest test mandated by RFRA.

B. Hobby Lobby *Found Attenuated Burdens to Be Substantial for the Purposes of RFRA*

In her *Hobby Lobby* dissent, Justice Ginsburg conceded the sincerity of the plaintiffs' religious beliefs.[73] She argued, however, that any burden that might arise from the use of a contraceptive by a Hobby Lobby employee was far too attenuated to amount to a substantial burden because "[n]o individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer's] decision or action."[74]

The majority disagreed, arguing that:

> [The dissent] dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accor-

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69. See, e.g., Marci A. Hamilton, The Religious Freedom Restoration Act Is Unconstitutional, Period, 1 U. Pa. J. Const. L. 1, 4 (1998) ("By enacting RFRA, Congress intended to reject, to reverse, and to eviscerate the Supreme Court's recent decision under the Free Exercise Clause, *Employment Div., Dep't of Human Resources of Oregon v. Smith*."); Alexander K. Hooper, Jurisdiction-Stripping: The Pledge Protection Act of 2004, 42 Harv. J. on Legis. 511, 522 (2005) ("Congress passed the Religious Freedom Restoration Act (RFRA), the stated purpose of which was to overrule *Smith*, and to restore the compelling interest with respect to such statutes."); Ronald D. Rotunda, The Powers of Congress Under Section 5 of the Fourteenth Amendment After *City of Boerne v. Flores*, 32 Ind. L. Rev. 163, 178 (1998) ("Congress enacted the RFRA to overturn *Employment Division, Department of Human Resources of Oregon v. Smith*.").

70. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006).

71. *Hobby Lobby*, 134 S. Ct. at 2761–62. The Court cited RLUIPA as evidence of Congress's intent to separate RFRA from pre-*Smith* free exercise jurisprudence. Id. However, this itself was a break from the Court's precedent. See supra note 21.

72. Id. at 2772.

73. *Hobby Lobby*, 134 S. Ct. at 2798 (Ginsburg, J., dissenting).

74. Id. at 2799 (alterations in original) (internal quotation marks omitted) (quoting Grote v. Sebelius, 708 F.3d 850, 865 (7th Cir. 2013) (Rovner, J., dissenting)).

> dance with *their religious beliefs*) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable).[75]

The majority further expounded that—under RFRA—a court should defer to the *challengers' own belief* that complying with a regulation or law is immoral.[76] The majority held that a court should question only whether civil or criminal sanctions for noncompliance are sufficiently substantial to warrant protection under RFRA.[77]

C. *The Compelling Interest–Least Restrictive Means Inquiry*

Hobby Lobby next discussed the compelling interest prong of the RFRA test. Here, the Court's analysis was largely in line with prior case law. The majority cited *Gonzales* for the proposition that RFRA "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."[78] A court must "loo[k] beyond broadly formulated interests"[79] and assess the "marginal interest"[80] in enforcing uniform compliance rather than granting exemptions to "particular religious claimants."[81]

The government's burden of proof does not end there. Even if it is able to demonstrate an individually tailored compelling interest, the government must show that it has taken the least restrictive means toward furthering said interest. "The least-restrictive-means standard is exceptionally demanding," and may be met only if the government is able to demonstrate that it "lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion."[82]

III. SHOWING A SUBSTANTIAL BURDEN THROUGH AN AFFIRMATIVE DUTY TO PROTECT AND PRESERVE HOLY PLACES

In future religious liberty land-use claims, tribes may be able to take advantage of *Hobby Lobby*'s mistrust of government action that burdens

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75. Id. at 2778 (majority opinion).

76. See id. (holding that whether an attenuated connection to an immoral end comprises individual immorality "implicates a difficult and important question of religion and moral philosophy" that should not be decided by a court).

77. Id. at 2779.

78. Id. (internal quotation marks omitted) (quoting Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006)).

79. Id. (alteration in original) (internal quotation marks omitted) (quoting *Gonzales*, 546 U.S. at 431).

80. Id.

81. Id. (internal quotation marks omitted) (quoting *Gonzales*, 546 U.S. at 431).

82. Id. at 2780.

religious belief. However, tribes must first find a way to successfully demonstrate that government decisions regarding the use of federal land forces them to choose between compromising their religious beliefs and either facing civil or criminal penalties or forgoing a governmental benefit.[83] This threshold requirement has been an insurmountable obstacle for Native religious liberty land-use claims, beginning with *Lyng* and continuing to the present.[84] Often, instead of offering evidence to meet this test, tribes contend it is a misinterpretation of the substantial burden requirement.[85] This strategy has not been successful.

Rejecting Native religious liberty claims based on the lack of a substantial burden allows courts to avoid the "exceptionally demanding" compelling interest–least restrictive means test.[86] Tribes must find a way to overcome the substantial burden obstacle in order to take advantage of the Court's new approach to RFRA claims.[87] This Part explores one possibility for establishing a substantial burden in religious liberty land-use claims based on a religious duty to protect holy places and be a steward of the land. Section III.A provides examples of religious duties to protect sacred places in Native religions. Section III.B returns to *Navajo Nation* and *Standing Rock* and explains how the duty to protect "coerce[s] [members] to act contrary to their religion under the threat of civil or criminal sanctions."[88] Finally, section III.C considers how the government may attempt to demonstrate a compelling interest for the burden it places on Native religions in future land-use cases.

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83. See id. at 2766. *Hobby Lobby* did not involve a potential loss of a government benefit, but that remains part of the substantial burden framework. See supra section I.A.

84. See, e.g., Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 239 F. Supp. 3d 77, 80 (D.D.C. 2017) (holding as fatal to the RFRA claim that the easement for the pipeline "does not impose a sanction on the Tribe's members for exercising their religious beliefs, nor does it pressure them to choose between religious exercise and the receipt of government benefits"); see also Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988) (holding that plaintiffs bringing a Free Exercise Clause challenge must show that they are either "coerced by the Government's action into violating their religious beliefs; [or that] governmental action penalize[s] religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens"); Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1069–70 (9th Cir. 2008) (en banc) ("[A] 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*).").

85. See, e.g., *Standing Rock Sioux Tribe*, 239 F. Supp. 3d at 91 ("Cheyenne River argues that whether it has been subjected to . . . sanction or pressure is irrelevant and contends instead that it is sufficient for purposes of showing substantial burden that the effect of the government's action is to prevent the Tribe's members from performing required religious sacraments at Lake Oahe." (citation omitted)).

86. *Hobby Lobby*, 134 S. Ct. at 2780.

87. See supra section I.A.

88. *Navajo Nation*, 535 F.3d at 1070.

A. *The Religious Duty to Protect*

When dismissing religious liberty land-use claims, courts have demonstrated a profound misconception of Native religions.[89] Part I briefly discussed the importance of sacred land to many Native religions and the time and place requirements of certain ceremonies and rituals. This section looks to the legal battles around the San Francisco Peaks and the North Dakota Access Pipeline as examples of tribes' religious duty to protect and act as stewards of the land.

1. *The San Francisco Peaks.* — "The San Francisco Peaks in northern Arizona . . . are sacred to at least thirteen formally recognized Indian tribes, and . . . this religious significance is of centuries' duration."[90] As explained in Part I, *Navajo Nation* primarily turned on the majority's distinction between "the government . . . coerc[ing] the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions" and government action which is "offensive to the Plaintiffs' feelings about their religion and will decrease the [Plaintiffs'] spiritual fulfillment."[91] But the Plaintiffs did not raise, and neither the majority nor the dissent discussed, religious obligations to protect the Peaks from defilement.

For the Navajo, the duty to protect the Peaks is written into the Navajo Tribal Code:

> Dine' [Navajo] Natural Law declares and teaches that:
>
> . . . .
>
> B. The six sacred mountains, [including] . . . Dook'o'oosliid [the San Francisco Peaks] . . . and all the attendant mountains must be respected, honored and protected for they, as leaders, are the foundation of the Navajo Nation; and
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> . . . .
>
> D. [T]he Dine' have a sacred obligation and duty to respect, preserve and protect all that was provided for we were designated as the steward of these relatives through our use of the sacred gifts of language and thinking; and
>
> . . . .
>
> G. It is the duty and responsibility of the Dine' to protect and preserve the beauty of the natural world for future generations.[92]

One may argue that the Navajo did not oppose creating snow out of sewage because it decreased their spiritual fulfillment, but rather because "the Navajos have a responsibility to remain on and care for the land

89. See Getches et al., supra note 5, at 769–70 ("The historical inability of federal and state courts to fit claims of Indian 'religious freedom' into the pigeonholes of the Bill of Rights creates a continuing tension.").

90. *Navajo Nation*, 535 F.3d at 1081 (Fletcher, J., dissenting).

91. Id. at 1063 (majority opinion).

92. The Fundamental Laws of the Dine' § 5 (Nov. 1, 2003), http://www.nativeweb.org/pages/legal/navajo_law.html [https://perma.cc/V4Z7-G5YU].

where the Holy People placed the Navajo people."[93] As one scholar has described, "[T]he goal of Dine' life is to orient oneself positively to the natural order and let it lead us, rather than introduce danger into the system by attempting to control it."[94]

The Hopi also have a sacred duty to protect the Peaks. The Hopi believe that when they first emerged in the world, they traveled to the Peaks, where they "entered into a spiritual covenant with *Ma'saw* [a spiritual presence] to take care of the land."[95] *Katsinam*, who "serve as intermediaries between the Hopi and the higher powers," reside in the Peaks for half the year.[96] The Hopi must treat the *Katsinam* with respect or face serious consequences to their well-being.[97]

In addition to the duty to protect the Peaks, the Hopi also have a religious duty of stewardship of the land. The Hopi believe that "the lands at the sacred center are the key to life. By caring for these lands in the Hopi way, in accordance with instructions from the Great Spirit, [they] keep the rest of the world in balance."[98] It seems natural to argue that spraying the Peaks with reclaimed wastewater prevents the Hopi from caring for the Peaks in the "Hopi way."

2. *Sacred Stones and Pure Water.* — The Dakota Access Pipeline threatens the purity of sacred water and the existence of sacred land. "The waters of the Missouri River . . . are sacred to the [Standing Rock Sioux] Tribe and essential to the Tribe's practice of [its] religion."[99] Faith Spotted Eagle, who lives on the Yankton Sioux Reservation in South Dakota, describes water as "the 'first medicine' [that] sustains us in our mother's womb . . . . It's used in ceremonies to heal people. The steam it

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93. Navajo Nation Human Rights Comm'n, Approving and Recommending that the Navajo Nation Register a Complaint of Navajo Human Rights Violation with the Organization of American States Inter-American Commission on Human Rights (March 27, 2013), http://www.nnhrc.navajo-nsn.gov/docs/NewsRptResolution/NNHRCMAR-27-13.pdf (on file with the *Columbia Law Review*); see also *Navajo Nation*, 535 F.3d at 1101 (Fletcher, J., dissenting) ("The Navajo believe their role on earth is to take care of the land.").

94. Adam Darron Dunstan, Toxic Desecration: Science and the Sacred in Navajo Environmentalism 69 (May 4, 2016) (unpublished Ph.D. dissertation, University at Buffalo, State University of New York) (on file with the *Columbia Law Review*).

95. *Navajo Nation*, 535 F.3d at 1099.

96. Id.

97. Id.

98. Suagee, supra note 37, at 11 (quoting Statement of Hopi Religious Leaders, Petition for a Writ of Certiorari at app. 27a–28a, Susenkewa v. Kleppe, 425 U.S. 903 (1976) (No. 75-844)).

99. Second Amended Complaint at ¶ 84, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 239 F. Supp. 3d 77 (D.D.C. 2017) (No. 1:16-cv-1534-JEB), 2017 WL 2742523; see also Phyllis Young, Beyond the Water Line, *in* Defending Mother Earth 85, 88 (Jace Weaver ed., 1996) ("Since birth and life itself begin in water, the power of women comes from water.").

gives off in a sweat lodge, for example, purifies. Water can clean a spirit when it's bleeding. It can calm a person and restore balance."[100]

The proposed pipeline also endangers numerous sites sacred to the Sioux, including sacred sites of "great cultural and historic significance."[101] "Sacred sites play an integral role in the creation of medicine men and the development of their powers," according to Professor Deloria.[102] In his book *The World We Used to Live In*, Deloria recounts how a "sacred picture stone" on the Standing Rock reservation "foret[old] events to come" on numerous occasions.[103] Deloria also explains how the "sites where sun dances are held are marked forever as locations where sacred things happened."[104]

The proposed pipeline would damage or destroy numerous "irreplaceable" sites that are sacred to the Standing Rock Sioux and other tribes in the area.[105] The ongoing protests of the pipeline are fueled by a moral obligation to protect sacred places and the water's purity.[106] This moral duty to protect sacred places may be the key to unlocking protection of these places under RFRA.

B. *Protection Through Disobedience: Can the Threat of Criminal Sanctions Establish a Substantial Burden Within the Meaning of RFRA?*

Establishing a religious obligation to protect holy land or act as a steward or caretaker of land is the first step to establishing a substantial burden under *Hobby Lobby*.[107] Tribes must next show that government action coerced them, via threat of civil or criminal penalties or the withholding of government benefits, to act against their religious beliefs.[108]

An argument for establishing a substantial burden might proceed as follows: If conventional means of protecting holy land—such as engaging with government agencies and seeking relief in the courts—prove fruitless, the only remaining option for tribes to fulfill their religious duty may be to resort to less conventional methods, potentially including trespass, vandalism, and destruction of private property. These actions carry the very real possibility of criminal sanctions, which in turn have the effect of forcing practitioners to abandon their moral obligation to protect

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100. Jessica Ravitz, The Sacred Land at the Center of the Dakota Pipeline Dispute, CNN (Nov. 1, 2016), http://www.cnn.com/2016/11/01/us/standing-rock-sioux-sacred-land-dakota-pipeline/index.html [https://perma.cc/9LX3-48YF].

101. See Supplemental Declaration of Tim Mentz, Sr. in Support of Motion for Preliminary Injunction at ¶ 7, *Standing Rock Sioux Tribe*, 239 F. Supp. 3d 77 (No. 1:16-cv-1534-JEB), 2016 WL 9240685 [hereinafter Mentz Declaration].

102. Vine Deloria Jr., The World We Used to Live In 161 (2006).

103. Id. at 151–52.

104. Id. at 165.

105. See Mentz Declaration, supra note 101, at ¶ 15.

106. See, e.g., Bailey, supra note 41; LaPier, supra note 29; Ravitz, supra note 100.

107. See supra note 76 and accompanying text.

108. See supra note 28 and accompanying text.

and preserve holy lands. The premise of this argument is not hypothetical. As Professor Deloria notes, "[T]raditional people have been forced to hold [religious] ceremonies under various forms of subterfuge and have been abused and imprisoned for doing them."[109]

While this argument would have been unlikely to succeed prior to *Hobby Lobby*,[110] tribes claiming a religious obligation to protect holy lands now have a stronger argument. First, by separating RFRA from free exercise jurisprudence,[111] *Hobby Lobby* frees future litigants from burdensome negative precedent that has doomed recent religious liberty land-use claims.[112] For example, in *Navajo Nation*, the Ninth Circuit rejected the tribes' claims in part because it believed "the cases that RFRA expressly adopted and restored—*Sherbert*, *Yoder*, and federal court rulings prior to *Smith*—also control the 'substantial burden' inquiry."[113] *Hobby Lobby* rejected this reasoning and provided a clean slate for tribes to demonstrate substantial burdens to their religious beliefs under a more friendly analysis.[114]

Next, while *Hobby Lobby* did not change the prongs of the substantial burden test, the majority showed great deference to the challengers' own view of how government action burdened their belief.[115] *Navajo Nation* dismissed the Tribes' substantial burden arguments, characterizing what is essentially spraying wastewater on one of the Tribes' most holy and revered places as merely "offensive to the Plaintiffs' religious sensibilities" and affecting only their "subjective, emotional religious experience."[116] In contrast, the Court declared the question in *Hobby Lobby*—whether the owners of a corporation were forced to act against their morals by making undifferentiated payments to an insurance company that provided a wide range of benefits to employees, which included certain contraceptives that were objectionable to the corporation's

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109. Deloria, For This Land, supra note 5, at 210.

110. A sincerely held religious belief would not excuse trespass or destruction of property under *Smith*. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 878–79 (1990) (stating that the Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate"); see also Bowen v. Roy, 476 U.S. 693, 699 (1986) ("[T]he First Amendment [does not] require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development . . . [and] cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."); cf. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2798 (2014) (Ginsburg, J., dissenting) (relying in part on *Bowen* to argue that religious objectors did not show a substantial burden on their ability to exercise their religion).

111. See supra section II.A.

112. See, e.g., Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 441–42 (1988).

113. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1069 (9th Cir. 2008) (en banc).

114. See supra section II.A.

115. See supra section II.B.

116. *Navajo Nation*, 535 F.3d at 1070.

owners but not to the employees who actually used them—to be "a difficult and important question of religion and moral philosophy."[117] The Court's careful avoidance of demeaning the *Hobby Lobby* plaintiffs' religious beliefs increases tribes' chance of successfully demonstrating a sufficient substantial burden to their religious beliefs in future land-use claims.

The government may argue that one cannot establish causality between, for example, a contract which allows recycled wastewater to be sprayed on a ski resort and practitioners of Native religions committing trespass or vandalism because a contract between the government and a third party and the criminal activity it compels is too attenuated. This argument is foreclosed under *Hobby Lobby*. The natural law of the Navajo recognizes a religious duty to protect the San Francisco Peaks.[118] The Hopi have a moral duty to "care for [the lands at the sacred center] in the Hopi way."[119] The duties invoked by these solemn religious obligations "implicate[] a difficult and important question of religion and moral philosophy . . . [and] it is not for [courts] to say that the[se] religious beliefs . . . are mistaken or insubstantial."[120]

The government may also argue that any possible sanction would be too mild to constitute a substantial burden or that the threat of criminal sanctions is too remote. Both of these arguments fail. The plaintiffs in *Yoder* faced only a five-dollar fine for violating Wisconsin's compulsory-attendance law, and the Court still found a substantial burden to their free exercise right.[121] Additionally, the threat of criminal sanctions is far beyond hypothetical. Casey Camp-Horinek, a Ponca woman, was arrested along with two tribal elders while praying at a protest of the North Dakota Access Pipeline.[122] She was fulfilling what she saw as a moral duty when she was arrested and charged with trespassing, rioting, and (strangely) endangerment by fire.[123]

Hobby Lobby established a standard of significant deference for establishing a substantial burden. As long as Native religious practitioners demonstrate that they face civil or criminal sanctions for acting in a way that *they believe* is in accordance with their religion, they should be able to meet the heretofore elusive substantial burden element of a RFRA claim.

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117. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2762, 2778 (2014).

118. See supra section III.A.1.

119. See Suagee, supra note 37, at 11 (quoting Statement of Hopi Religious Leaders, Petition for a Writ of Certiorari at app. 27a–28a, Susenkewa v. Kleppe, 425 U.S. 903 (1976) (No. 75-844)).

120. *Hobby Lobby*, 134 S. Ct. at 2778–79.

121. See Wisconsin v. Yoder, 406 U.S. 205, 207–08 (1972). According to the Bureau of Labor Statistics, five dollars in 1972 is equivalent to $30.76 in October 2018. See Bureau of Labor Statistics CPI Inflation Calculator, https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=5&year1=197201&year2=201810 [https://perma.cc/6FQP-WRJ3] (last visited Jan. 15, 2019).

122. Monet, supra note 1.

123. See id.

C. *Moving Forward: Grappling with the Compelling Interest Test*

Importantly, establishing a religious duty to protect sacred places does not in and of itself create a path to victory for tribes. It instead only provides an opportunity for tribes to explain how government decisions affecting sacred land create a substantial burden on their religious belief, thus overcoming what has been a significant obstacle to religious liberty land-use claims.[124] However, even after establishing a substantial burden on their religious belief, tribes will still have to show that the government either did not have a compelling interest for its action or that the government did not use the least restrictive means of pursuing that interest.[125]

The burden of proof to satisfy the compelling interest inquiry is less onerous than that required for the substantial burden test.[126] *Gonzales* held that the government did not have a compelling interest in enforcing the CSA against a sect of Christian Spiritists.[127] Recently, the Fifth Circuit relied on *Hobby Lobby* to hold that limiting permits for possessing eagle feathers under the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act to members of federally recognized tribes was not the least restrictive means to further the government interest in protecting eagles.[128]

However, practitioners of Native religions may face a stiffer challenge in cases that seek to limit how the federal government can use land under its control. Courts have shown a special solicitude to government interests in land-use cases.[129] Still, the original panel decision in *Navajo Nation* shows that, at least when the government is contracting with a private entity, this presumption is not insurmountable.[130]

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124. See supra section I.B.

125. See supra section II.C. The litigation resulting from President Trump's decision to reduce Bears Ears National Monument by over eighty-five percent presents one opportunity for tribes to use RFRA to protect sacred land. See Julie Turkewitz, Trump Slashes Size of Bears Ears and Grand Staircase Monuments, N.Y. Times (Dec. 4, 2017), https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html (on file with the *Columbia Law Review*).

126. See supra section II.C.

127. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006).

128. See McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 468 (5th Cir. 2014).

129. See, e.g., Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988) ("Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land."); Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1072 (9th Cir. 2008) (en banc) ("Like the Indians in *Lyng*, the Plaintiffs here challenge a government-sanctioned project, conducted on the government's own land, on the basis that the project will diminish their spiritual fulfillment.").

130. See Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1044–45 (9th Cir. 2007), rev'd en banc, 535 F.3d 1058 (9th Cir. 2008) ("Even if there is a substantial threat that the Snowbowl will close entirely as a commercial ski area, we are not convinced that there is a compelling governmental interest in allowing the Snowbowl to make artificial snow from treated sewage effluent to avoid that result.").

CONCLUSION

When it comes to their free exercise right, "Native[s]. . . [have] never received the protection their faiths deserved."[131] *Hobby Lobby* opened the door for renewed attempts to obtain that protection. If tribes are able to demonstrate a substantial burden on their religious beliefs based on a religious obligation to protect holy lands, they can force courts to reach the compelling interest–least restrictive means element of a RFRA claim and scrutinize the government's justification for its actions. This in and of itself does not guarantee victory for religious liberty land-use claims under RFRA, but applying the "exceptionally demanding" compelling interest–least restrictive means test to government justifications for land-use decisions would be a significant step toward helping tribes protect and preserve sacred lands.

131. Garrett Epps, The Strange Career of Free Exercise, Atlantic (Apr. 4, 2016), http://www.theatlantic.com/politics/archive/2016/04/the-strange-career-of-free-exercise/476712/ [https://perma.cc/4GJG-VMJC].